



7536-01-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

45 CFR Part 1173

RIN 3136-AA42

Processes and Procedures for Issuing Guidance Documents

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Final rule.

SUMMARY: This final rule sets forth the National Endowment for the Humanities' (NEH) internal policies and procedures governing the issuance of guidance documents as required by Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents" (E.O. 13891).

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Lisette Voyatzis, Deputy General Counsel, 400 7th Street, SW, Room 4060, Washington, DC 20506; (202) 606-8322; gencounsel@neh.gov.

SUPPLEMENTARY INFORMATION:

1. Background

NEH is adopting this final rule pursuant to E.O. 13891¹, which requires federal agencies to finalize regulations, or amend existing regulations as necessary, that set forth processes and procedures for issuing guidance documents. In compliance with E.O. 13891, this final rule establishes NEH's policy, procedures, and responsibilities for issuing guidance documents in

¹ 84 FR 55235 (Oct. 9, 2019).

order to ensure that the agency performs the required review and clearance before issuance and follows all stages of the rulemaking process.

2. Compliance

Administrative Procedure Act of 1946

Under the Administrative Procedure Act, an agency may waive the normal notice and comment procedures if the action is a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b)(A). This final rule merely incorporates the requirements set forth in E.O. 13891 into NEH's internal policy and procedures for issuing guidance documents. Accordingly, NEH has concluded that there is good cause to publish this rule without prior public notice and comment.

E.O. 12866, Regulatory Planning and Review, and E.O. 13563, Improving Regulation and Regulatory Review

This action is not significant under E.O. 12866.

E.O. 13771, Reducing Regulation and Controlling Regulatory Costs

This action is not expected to be an E.O. 13771 regulatory action because this action is not significant under E.O. 12866.

E.O. 13132, Federalism

This rulemaking does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

E.O. 12988, Civil Justice Reform

This rulemaking meets the applicable standards set forth in section 3(a) and 3(b)(2) of E.O. 12988. Specifically, this final rule is written in clear language designed to help reduce litigation.

E.O. 13175, Indian Tribal Governments

Under the criteria in E.O. 13175, NEH evaluated this final rule and determined that it will not have any potential effects on Federally recognized Indian Tribes.

E.O. 12630, Takings

Under the criteria in E.O. 12630, this rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

Regulatory Flexibility Act of 1980

This rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

Paperwork Reduction Act of 1995

This rulemaking does not impose an information collection burden under the Paperwork Reduction Act. This action contains no provisions constituting a collection of information pursuant to the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not contain a Federal mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year.

National Environmental Policy Act of 1969

This final rule will not have a significant effect on the human environment.

Small Business Regulatory Enforcement Fairness Act of 1996

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of nonagency parties. Accordingly, it is not a “rule” as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996), and the reporting requirement of 5 U.S.C. 801 does not apply.

E-Government Act of 2002

All information about NEH required to be published in the *Federal Register* may be accessed at www.neh.gov. The website <https://www.regulations.gov> contains electronic dockets for NEH’s rulemakings under the Administrative Procedure Act of 1946.

Plain Writing Act of 2010

To ensure this final rule was written in plain and clear language so that it can be used and understood by the public, NEH modeled the language of this final rule on the Federal Plain Language Guidelines.

List of Subjects in 45 CFR 1173

Administrative practice and procedure.

For the reasons stated in the preamble, the National Endowment for the Humanities adds 45 CFR part 1173 to read as follows:

PART 1173 — PROCESSES AND PROCEDURES FOR ISSUING GUIDANCE DOCUMENTS

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Authority: 5 U.S.C. 301; 20 U.S.C. 956.

§ 1173.1 Purpose and scope.

- (a) This part prescribes general procedures that apply to guidance documents issued by the National Endowment for the Humanities (NEH).
- (b) This part governs all NEH employees and contractors (collectively, NEH staff) involved with all phases of issuing NEH guidance documents.
- (c) This part applies to all NEH guidance documents in effect on or after [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

§ 1173.2 Definition of guidance document.

- (a) For purposes of this part, the term guidance document means any agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include the following:
 - (1) Rules promulgated pursuant to notice and comment under 5 U.S.C. 553 or similar statutory provisions;
 - (2) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);
 - (3) Rules of agency organization, procedure, or practice;
 - (4) Decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions;

- (5) Internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties;
- (6) Internal executive branch legal advice or legal opinions addressed to executive branch officials;
- (7) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (e.g., case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (e.g., guidance pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (e.g., congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;
- (8) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;
- (9) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new regulatory policy;
- (10) Guidance pertaining to military or foreign affairs functions;
- (11) Grant solicitations and awards;
- (12) Contract solicitations and awards; or
- (13) Purely internal agency policies or guidance directed solely to NEH staff or other federal agencies that are not intended to have substantial future effect on the behavior of regulated parties.

§ 1173.3 Review and clearance.

All NEH guidance documents, as defined in § 1173.2, require review and clearance in accordance with this part. All agency guidance documents must be reviewed and cleared by NEH's Office of the General Counsel (OGC).

§ 1173.4 Requirements for clearance.

The NEH OGC's review and clearance of guidance documents shall ensure that each guidance document the agency proposes to issue satisfies the following requirements:

- (a) The guidance document complies with all relevant statutes and regulations (including any statutory deadlines for agency action);
- (b) The guidance document identifies or includes:
 - (1) The term "guidance" or its functional equivalent;
 - (2) A concise name for the guidance document;
 - (3) The NEH office or division issuing the guidance document;
 - (4) A unique identifier, including, at a minimum, the date of issuance, title of the document, and a number assigned by NEH's OGC (or, in the case of a significant guidance document, the Z-RIN (regulatory identification number));
 - (5) The general topic that the guidance document addresses;
 - (6) Citations to applicable statutes and regulations;
 - (7) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and
 - (8) A concise summary of the guidance document's content.
- (c) The guidance document avoids using mandatory language, such as "shall," "must," "required," or "requirement," unless the language is describing an established statutory or

regulatory requirement or is addressed to NEH staff and will not foreclose NEH's consideration of positions advanced by affected private parties;

(d) The guidance document is written in plain and understandable English; and

(e) All guidance documents include a clear and prominent statement declaring that the contents of the document do not have the force and effect of law, are not meant to bind the public in any way, and the document is intended only to provide clarity to the public regarding existing requirements under the law or NEH's policies.

§ 1173.5 Public access to guidance documents.

NEH will:

(a) Oversee the creation of a guidance portal on the agency's website;

(b) Ensure all effective guidance documents, identified by a unique identifier as described in § 1173.4(b)(4), are on the guidance portal in a single, searchable, indexed database, and available to the public;

(c) Note on the agency's guidance portal that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;

(d) Maintain and publish on NEH's guidance portal a means for the public to comment electronically on any guidance documents that are subject to notice-and-comment procedures, and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents in accordance with § 1173.11;

(e) Include on the agency's guidance portal the date on which all guidance documents were posted to the website and a hyperlink to all guidance documents;

- (f) Receive and address complaints from the public that NEH is not following the requirements of OMB's Good Guidance Bulletin or that NEH is improperly treating a guidance document as a binding requirement;
- (g) Note on the agency's guidance portal that any guidance document not posted on the guidance portal is rescinded, and that neither the agency nor a party may cite, use, or rely on any guidance document that is not posted on the guidance portal, except to establish historical facts; and
- (h) Include a link to this part on the agency's guidance portal.

§ 1173.6 Waiver of publication of guidance documents.

- (a) Sections 1173.5(b) and (e) do not apply to guidance documents for which a waiver has been applied from the OMB Director pursuant to Subsection 3(c) of Executive Order (E.O.) 13891.
- (b) Requests for waivers must be written and signed by a senior policy official at the agency.

§ 1173.7 Good faith cost estimates.

- (a) NEH will, to the extent practicable, make a good faith effort to estimate the likely economic cost impact of the guidance document to determine whether the document might be significant.
- (b) When assessing or explaining whether it believes a guidance document is significant, NEH will, at a minimum, provide the same level of analysis that would be required for a major determination under the Congressional Review Act.²
- (c) When OMB's Office of Information and Regulatory Affairs (OIRA) determines that a guidance document will be economically significant, NEH will conduct and publish an assessment of the potential costs and benefits of the regulatory action (which may entail a

² See OMB Memorandum M-19-14, Guidance on Compliance with the Congressional Review Act (April 11, 2019).

regulatory impact analysis) of the sort that would accompany an economically significant rulemaking, to the extent reasonably possible.

§ 1173.8 Definition of significant guidance document.

(a) The term *significant guidance document* means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) To lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the United States economy, a sector of the United States economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities;

(2) To create serious inconsistency or otherwise interfere with an action that another federal agency has taken or planned;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

(b) The term significant guidance document does not include the categories of documents excluded by this part or any other category of guidance documents that NEH's OGC, in consultation with OIRA, has exempted in writing.

§ 1173.9 Procedures for significant guidance documents.

(a) NEH will make an initial, preliminary determination about a guidance document's significance. Thereafter, NEH will submit the document to OIRA to determine whether a guidance document is significant, unless the guidance is otherwise exempted from such a determination by the Administrator of OIRA.

(b) If OIRA designates a guidance document as significant, NEH will submit the guidance document to OIRA for review under E.O. 12866 prior to issuing it; and NEH will process significant guidance in compliance with the applicable requirements for regulations or rules, including significant regulatory actions, as set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(c) The NEH Chairperson signs or approves significant guidance documents.

§ 1173.10 Notice-and-comment procedures.

Except as provided in paragraph (b) of this section, all proposed NEH guidance documents determined to be significant guidance documents within the meaning of § 1173.8 will be subject to the following informal notice-and-comment procedures.

(a) NEH's OGC will:

(1) Publish a notice in the Federal Register announcing that a draft of the proposed guidance document is publicly available;

(2) Post the draft guidance document on its website, at www.neh.gov/guidance;

(3) Invite public comment on the draft document for a minimum of thirty (30) days; and

(4) Prepare and post a public response to major concerns raised in the comments, as appropriate, on its guidance portal, either before or when the guidance document is finalized and issued.

(b) The requirements of paragraph (a) of this section will not apply to any significant guidance documents or categories of significant guidance documents for which NEH's OGC finds—in consultation with OIRA, the proposing NEH office/division, and the NEH Chairperson—good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefor in the issued guidance).

(c) Where appropriate, NEH's OGC may recommend to the NEH Chairperson that a particular guidance document that is otherwise of importance to the agency's interests should also be subject to the informal notice-and-comment procedures described in paragraph (a) of this section.

§ 1173.11 Petitions to withdraw or modify guidance.

(a) Any person may submit a petition to NEH requesting withdrawal or modification of any effective guidance document by writing to the NEH Office of the General Counsel at: gencounsel@neh.gov, or National Endowment for the Humanities, Attn: Office of the General Counsel, 400 Seventh Street, SW, Washington, D.C., 20506.

(b) The petition must:

(1) Describe the nature of the request and provide the title or substance of the guidance you are requesting that NEH withdraw or modify; and

(2) Explain, with justification, how the document should be modified or why the document should be withdrawn.

(c) NEH will review each request and determine whether to grant the request or deny it in whole or in part. NEH will respond to all requests in a timely manner, but no later than ninety (90) days after receipt of the request.

§ 1173.12 Rescinded guidance.

(a) NEH's OGC, in consultation with the NEH office/division that issued the guidance document, shall determine whether to rescind a guidance document.

(b) Once rescinded, NEH will remove the hyperlink to the guidance document from the guidance portal. The agency will list on the guidance portal, for at least one year after rescission, the guidance document's name, title, unique identifier, and date of rescission.

(c) No NEH office/division or NEH staff may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

§ 1173.13 Exigent circumstances.

In emergency situations, or when NEH is required by statutory deadline or court order to act more quickly than normal review procedures allow, NEH will notify OIRA as soon as possible and, to the extent practicable, comply with the requirements of this part at the earliest opportunity. Wherever practicable, NEH should schedule its proceedings to permit sufficient time to comply with the procedures set forth in this part.

§ 1173.14 Reports to Congress and the Government Accountability Office (GAO).

Unless otherwise determined in writing, NEH will, upon issuing a guidance document, submit a report to Congress and GAO in accordance with the procedures described in the Congressional Review Act.

§ 1173.15 No judicial review or enforceable rights.

This part is intended to improve the internal management of the National Endowment for the Humanities. As such, it is for the use of NEH personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

Dated: August 18, 2020.

Caitlin Cater,

Attorney-Advisor, National Endowment for the Humanities.

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